IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

Number 63.

JAMES C. DAVIS, AGENT OF THE PRESIDENT, UNDER SECTION 206 OF THE TRANSPORTATION ACT, 1920,

Petitioner,

vs.

JOHN O'HARA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

PETITION FOR REHEARING.

To the Honorable Chief Justice, and the Associate Justices, of the Supreme Court of the United States:

John O'Hara, Respondent herein, by his Attorneys, respectfully presents his petition praying this Honorable Court to recall its mandate and grant a rehearing of the above entitled case heretofore decided at the present term, for the following reasons:

I.

This Honorable Court erred in holding that Petitioner's Special Appearance and Motion to Quash Summons, and proceedings thereunder, did not constitute a general appearance and a waiver of objection to the jurisdiction of the trial Court over Petitioner's person, as follows:

> (The record shows Petitioner, prior to answer, filed a special appearance, objecting to jurisdiction over his person and over the subject matter. This Honorable Court held the objection to jurisdiction of subject matter should be disregarded as (a) never carried into effect, (b) not being supported by the reasons assigned (Director General Orders), and (c) not questioning jurisdiction over subject matter over this class of actions.)

A. This Honorable Court erred in holding the challenge to the jurisdiction of the trial Court over subject matter of the action was never carried into effect.

This Honorable Court announced the Law that while the subject matter objection was plainly stated in the formal charging parts of the instrument, yet such objection should be disregarded if, construing the instrument in its entirety together with the proceedings had thereunder, it appeared such objection was not, in fact, intended—that it would be held not intended if it appeared that the grounds alleged (Director General orders) were not intended to support the *subject matter objection* and further that no effort was made by Petitioner to carry such objection into effect. Such is the Nebraska rule. (Perrine v. Knights Templar, 71 Neb. 267, 275.)

In this respect this Honorable Court overlooked the record showing Petitioner to have contended in the Supreme Court of Nebraska that:

> "Actions for personal injuries growing out of Federal control of railroads are not transitory but are local under the plain terms of the order." (Add. Rec. p. 34);

that that Court devoted two pages of its opinion to an analysis and decision of this issue which it specifically noted as having been "strongly urged" by Petitioner (Rec. pp. 198, 199); that Petitioner came before this Honorable Court complaining of the Nebraska Supreme Court's adverse ruling thereon and seeking a reversal thereof, arguing:

> "The Director General was sued in Douglas County. He was duly served with summons. The plaintiff did not reside in that county and his pretended cause of action did not arise therein. Under the plain terms of the order the Court was without jurisdiction. The defendant by his motion challenged the jurisdiction. The only question involved was the validity of the order. The question as to whether or not the cause of action was local or transitory was answered by the order itself in plain language. It was not transitory, except within the limits of the order. The very purpose of the order was to make what had theretofore been a transitory cause of action a local cause of action, statutes and decisions to the contrary notwithstanding." (Brief of Pet. on Pet. for Cert. p. 2);

and that Petitioner never abandoned such contention. (Brief of Pet. p. 16.)

Whether an action is transitory has nothing to do with jurisdiction of person but concerns subject matter only (15 C. J. 734, 737, Perrine v. Knights Templar, 71 Neb. 267, 275).

The record further shows Petitioner contended the order so completely removed jurisdiction from the Douglas County District Court that that Court was without jurisdiction even if defendant filed a general appearance. (Brief of Petitioner,

p. 16.) (General appearance always waives objection to jurisdiction of person but never of subject matter. 15 C. J. 801, 7 R. C. L. 1044, paragraph 77).

B. This Honorable Court erred in holding that "the stated purpose of the special appearance was broader than the grounds alleged and unsupported thereby."

Petitioner's arguments, as hereinbefore shown, were based exclusively on the very grounds set up in the special appearance—Director General's order—on which he sought too broad a construction.

This Honorable Court overlooked the decision of Perrine v. Knights Templar, supra, in which defendant raised

> "* * * the legal question whether or not the alleged cause of action set forth in the Petition was local or transitory. The challenge was made to the Court by apt language in the formal part of the instrument and in the reasons assigned, and is a jurisdictional question, not of the person, but of the subject matter of the action. And when followed by an exhaustive showing on this point—as was done—of the truth of these allegations, we can come to but one conclusion, and that is that it was the intention of the pleader to challenge the jurisdiction of the Court over the subject matter, and that he has done so both by his averment and by the evidence" (arguments).

C. This Honorable Court erred in holding Petitioner did not intend the objection to question the power of the Court to adjudicate concerning the subject matter of the class of cases to which plaintiffs' claim belonged.

Petitioner's object was to have the Court pronounce a decision that this order made every action local and not transitory and that courts of states foreign to the place of

injury or plaintiff's residence at the time were deprived of the power to act.

II.

This Honorable Court overlooked the rule of practice in Nebraska that when a special appearance to object to jurisdiction of the person joins an objection to jurisdiction of subject matter the appearance is not special, but is general, and constitutes a waiver of objection to jurisdiction over the person.

An objection to jurisdiction over the person so waived cannot be reasserted by answer or otherwise:

Perrine v. Knights Templar, 71 Neb. 267 (keystone case), holding "to avoid an appearance, the objection must be confined to * * * (objection to jurisdiction of person), has been the holding of this Court from its organization."
Clark v. Bankers Acc. Ins. Co., 147 N. W. 1118;
Summitt Lumber Co. v. Cornell-Yale Co., 85 Neb. 468;
Legan v. Smith, 151 N. W. 955;
Lillie v. Mod. Woodmen of Am., 89 Neb. 1;
Brainard & Chamberlain v. Butler, 77 Neb. 515;
State v. Westover, 107 Neb. 593.

The following Nebraska cases apply the same rule:

Maxwell v. Maxwell, (Neb.) 184 N. W. 227;
McKillop v. Harvey, 80 Neb. 264;
Bucklin v. Strickler, 32 Neb. 602;
Plano Mfg. Co. v. Nordstrom, 63 Neb. 123;
Montague v. Marunda, 71 Neb. 805;
Herpolsheimer v. Acme Harvester Co., 83 Neb. 53;
Bankers Life v. Robbins, 59 Neb. 170;
Rabow v. Tate, 93 Neb. 198.

This Court, some thirty-five years ago in Fitzgerald v. Fitzgerald, 137 U. S. 98, *specifically recognized such to be*

the established practice of Nebraska, as well as in other Code States, and in that case affirmed such practice. This Fitzgerald case has become the settled law of this Court and a precedent upon this point in other jurisdictions as shown by 4 C. J. 1333 and Rose's Notes which specifically cite the following Federal cases:

> Jones v. Gould, 141 Fed. 699 (defendant objecting to jurisdiction of Court over person and also subject matter (in special appearance) makes voluntary general appearance);
>
> Mahr v. Union Pacific R. Co., 140 Fed. 924 (right to make special appearance not inherent, defendant challenging jurisdiction over both person and subject matter makes general appearance).

This Honorable Court overlooking above settled practice of Nebraska was diverted by the statute referred to and the following four cases which do not contradict the above settled principles.

FIRST: Section 8612, Comp. Stat. of Nebraska, 1922, provides that where defect is not shown on the face of the petition the objection may be pleaded in the answer with all other defenses.

Hurlburt v. Palmer, 39 Neb. 158, was a case where the objection did not appear on the face of the petition and *no special appearance whatsoever was filed,* but the objection was first raised by answer under that statute.

The case of *Kyd v. Exchange Bank of Courtland,* 56 Neb. 557, like the above case, was where the petition did not show defects and *no special appearance was filed.* The matter was raised only in the answer under the statute.

These two cases merely affirm the right granted by Section 8612.

In *Baker v. Union Stock Yards Natl. Bank,* 63 Neb. 801, as in the two preceding cases, *no special appearance was ever filed.* The Court, while affirming the statutory right, held that by failing to set it up in the original answer it was forever waived and could not thereafter be claimed by amended answer.

In *Templin v. Kimsey,* 74 Neb. 614, defendant made a special appearance limited to objection to jurisdiction over the person. This being overruled he thereafter filed an answer including this defense.

The basic element of the above four cases cited by this Honorable Court merely defines the *time* of claiming the privilege under Section 8612 of the Statutes of 1922. It may be taken for the *first time by answer* (Hurlburt v. Palmer and Kyd v. Exchange National Bank, supra); but not *after* answer (Baker v. Union Stock Yards, supra); and its being taken *too soon* is not fatal to the right to set it up by answer if taken by special appearance limited solely and exclusively to such objection (Templin v. Kimsey, supra).

The question of Nebraska Practice which controls the case at bar is not a question concerning the *time* of making the claim nor the right to make the claim by a Special Appearance limited to such objection, but grounds upon entirely different considerations and an entirely independent rule of law, viz: Whether a defendant, desiring to object to the Court's jurisdiction of his person prior to answer, must make such objection by Special Appearance limited solely and exclusively to such objection or whether he can make it by an instrument which includes other and additional objections. Nebraska courts have answered that the

contents of the instrument by which such claim is made *prior to answer* must be limited to that one and only objection and that a joining of any other objection in such instrument or the making of any additional objection therein constitutes a general appearance and a waiver of the objection to person.

This Honorable Court overlooked the fact that the Supreme Court of Nebraska did not hold the waiver of objection to jurisdiction over the person to have resulted from the act of *prematurely* claiming the privilege by Special Appearance prior to answer but because the rule hereinbefore discussed was not complied with *in that the substance of the instrument by which it was claimed was not a Special Appearance because not limited exclusively to such a claim.*

The holding of this Honorable Court stated its reasons for such holding to be that:

> "Under the Statutes and practice in Nebraska, defendant was not required to appear specially to object to jurisdiction over his person. Where, as in this case, the defects do not appear on the face of the petition, objection to jurisdiction over the person of the defendant and over the subject-matter of the action may be taken by answer setting up defenses on the merits, without or after prior objection by a *special* appearance and motion."

While this is a true statement of law it is also the statement of law wholly inapplicable to the facts in the case at bar because the record shows that the pleader sought to set up his objection to jurisdiction of person not "after prior objection by SPECIAL appearance and motion" but after a prior objection by GENERAL appearance.

It will be noted there is nothing in above four cases

which interferes with the rule that a general appearance is a waiver of the right to claim the privilege by answer and further that there is no conflict among the entire nineteen cases; that the practice has been consistent from its first announcement down to the decision in the case at bar; that there has been no contradiction or innovation of practice as this Honorable Court has been led to believe.

Because this Honorable Court erred in overlooking the matter hereinbefore mentioned it results that it failed to recognize that the case at bar is on all fours with and controlled by the case of Perrine v. Knights Templar, 71 Neb. 267, in all elements hereinbefore mentioned.

The holding of this Honorable Court that "even if the motion amounted to an objection to jurisdiction over subject matter it cannot reasonably be held to give the Court jurisdiction," is not according to the established practice of Nebraska nor supported by any authority.

III.

This Honorable Court erred in holding in respect to the objection to jurisdiction of person set up in the answer that

> "There is no reason why a defense pleaded but not urged at an earlier trial may not be insisted upon at a new trial."

Moulor v. Am. Life Ins. Co., 28 L. Ed. 447, cited by the Court, is a case where two distinct, consistent and continuing defenses were pleaded *to the merits* and proof concentrated on one of these defenses. Upon second trial effort was devoted to the other defense: suicide, in an action on an insurance policy. This Honorable Court confused pure, or absolute and inherent defenses, going to the merits with a

waivable venue privilege (which was merely a plea in abatement, 1 C. J. 33).

(Privileges must be not only asserted but maintained by the party to whom allowed:

Gyer v. Irvin, 1 L. Ed. 762;
At. Coast Line Ry. Co. v. Mims, 61 L. Ed. 476, 478).

Under all codes, similar to that of Nebraska, such privileges may be pleaded in the answer with defenses, where the petition does not show the defect; but even though they may be pleaded together, nevertheless the common law rule has not been changed with reference to a prompt disposal of such dilatory or technical defenses, which must be disposed of promptly or before decision on the merits, or at most they must be urged and insisted upon during the trial or they will be considered as being waived or abandoned. (Some of these cases under the Code provision for joindure of all defenses in the answer show the Code States nevertheless adhere to the common law rule of the order of disposition—especially promptness—because among other things, of the very evil suffered in the case at bar, such as loss by statute of limitations, where a ruling is not promptly obtained upon a plea in Abatement and hold the defendant may not seek a judgment on the merits and reserve a ruling on his plea. Wisconsin, Kansas, Missouri and Oklahoma have Code provisions similar to Sec. 8610 and 8612 of Nebraska Statutes, 1922).

Barwick v. Am. Mfg. Co., 108 S. E. 119;
Stevens v. Lee, 78 Tex. 279 (8 S. W. 40);
Board of Supervisors v. Van Stallen, 45 Wis. 675;
Hill v. Walker, 167 Fed. 241, 245, 244;
Wells v. Patton, 50 Kan. 732;
Linney v. Thompson, 45 P. 456, 457;
Christenson v. Williams, 35 Mo. App. 297, 307, 301;

El Reno E. L. & Tel. Co. v. Jemison, (Okla.) 50 P. 144, 148;
Hicks v. Beam, 112 N. C. 642;
1 C. J. 258, 268, 272.

The following cases hold specifically that a defendant by failing to insist upon a plea to jurisdiction of person at first trial is estopped from insisting upon it on second trial:

Barwick v. American Mfg. Co., 108 S. E. 119;
Stevens v. Lee, 70 Tex. 279, 8 S. W. 40.

The statement that

> "there is no reason why a defense pleaded but not urged at an earlier trial may not be insisted upon at a new trial"

is good law as to defenses going to the merits, but under all authorities has no application to a Plea in Abatement or privilege.

Petitioner should have taken the steps at the first trial that he took at the second trial.

IV.

This Honorable Court overlooked the effect of its previous decisions, which were not overruled, holding, like the Nebraska Practice, that the allegations in the motion to quash need not be denied, and that such a motion should be overruled where no affidavit or evidence is offered by the moving party to sustain the same.

The Supreme Court of Nebraska decided that the venue privilege as to place of suit was not properly raised, supported and presented to the highest Court of the State, because the motion to quash in the Special Appearance was not supported by affidavit or evidence and was properly overruled, and therefore even had it been presented by cross-

appeal (which was not done) there was no reversible error in the order.

This Honorable Court inferred that it was the duty of O'Hara to have denied the allegations in the Special Appearance and motion to quash, in effect saying that no evidence was necessary to support the allegations of the motion unless denied. This was emphasized by this Honorable Court by mention at several places in the opinion.

Under the Nebraska Statutes no provision is made for pleading to a motion or joining issue, but under the practice a counter-showing may be filed to meet the affidavits filed by the moving party. If the moving party files no showing, no controverting affidavits are required and the motion should be overruled. Perrine v. Knights Templar, 71 Neb. 267.

R. C. L., Vol. 19, page 672, states the general practice to be the same as we contend it is in Nebraska, and cites Brownfield v. South Carolina, 189 U. S. 426, 47 L. Ed. 882, wherein this Honorable Court said, speaking through Justice Holmes:

> "It is suggested that the allegations of the motion to quash not having been controverted and having been supported by the affidavit of the defendant, must be taken to be true. But a motion, although reduced to writing, is not a pleading, and does not require a written answer * * *."

While such an allegation is sometimes denied, a denial is not necessary, but under above and following cases evidence is the requisite that must be presented to sustain the claim.

Smith v. State, 40 L. Ed. 1082;
Tarrance v. Florida, 47 L. Ed. 572.

In the case at bar the reply was a general denied of all allegations in the answer. However, the Special Appearance constituted a general appearance before any answer was filed.

V.

This Honorable Court erred in classing waiver of privilege with unwaivable sovereignty exemption from suit.

This Honorable Court announced the rule that this venue privilege would not be held waived unless such waiver was clearly made, citing cases concerning congressional waiver of the sovereign right not to be sued at all,—which can never be waived by the Attorney General, or any other authority but Congress.

In its opinion this Honorable Court expanded this sovereignty rule to apply to mere venue privileges, saying: The Director General

> "will not be presumed to have waived any sovereign rights *or privileges* unless it has plainly done so."

The cases cited were actions brought entirely beyond the congressional authorization; or brought beyond the period of limitations prescribed by Congress; or where the courts denied the validity of these orders and refused to allow the venue privilege; or for fines and penalties expressly excluded by Congress in said Section 10.

As a matter of law a different rule applies to waiver of venue privilege (a Plea in Abatement) than that of congressional waiver of sovereign exemption from any suit. Also a mere failure to promptly set up and thereafter insist upon such a plea of privilege estops the Government as well as persons from subsequently claiming its benefit. This is shown by the following cases, where mere failure by the

Government or others to promptly claim a venue privilege granted by a Federal law waives the privilege:

Hvoslef v. U. S., 59 L. Ed. 813, 818;
Thames & Mersey, etc., v. U. S., 237 U. S. 19;
Panama Ry. Co. v. Johnson, 68 L. Ed. 748, 751;
Lee v. Cheas. & O. Ry. Co., 67 L. Ed. 443;
Camp v. Gress, 63 L. Ed. 997;
First Natl. Bank v. Morgan, 33 L. Ed. 282, 284.

The case of Alabama & V. Ry. Co. v. Journey, 66 L. Ed. 154, held in discussing th Director General order that it was within the power of the Director General to prescribe the venue of suits and that this limitation was a reasonable *venue privilege*, which opinion places this provision as to place of suit in the same class of above cases.

In Peoria & Pekin Ry. Co. v. U. S., 68 L. Ed. 427, interpreting the same kind of restriction as to place of suit in the Transportation Act of 1920, held that the limitation was not only a matter of *venue* but was a privilege also waivable. (It further held that a failure to cross-appeal was a waiver.)

Congress gave us the distinct, clear, right to sue for damages from negligence. The President, through the Director General, promulgated an order providing for special venue which was a mere privilege available in any manner recognized by the practice of the courts.

We had the right to sue and the Director General had a right to claim a privilege of the place of suit and the right to waive this privilege.

VI.

This Honorable Court erred in its application of the law that it was not bound by the decision of the state court, and

that it may determine for itself whether the Director General sufficiently asserted and insisted upon his venue privilege and that this Honorable Court reserves the right to examine the facts upon the question of how a privilege is asserted and its sufficiency.

But, the question of waiving that right after having been asserted (if it was) is an entirely different question.

This Honorable Court in considering the asserting and maintaining of such right overlooked the question of the waiver of that right, which this Honorable Court explained in Pierce v. Somerset Ry. Co., 43 L. Ed., p. 316, to-wit:

(Syl. 1.)

"The question whether a state statute impairs the obligation of a contract is a Federal question; but the question whether the defense of estoppel by laches and acquiescense is established is not a Federal question."

(Body P. 319.)

"A person may by his acts or omission to act waive a right which he might otherwise have under the Constitution of the United States, as well as under a statute, and the question whether he has or has not lost such right by his failure to act, or by his action, is not a Federal one.

Eustis had a right which was protected by the Constitution of the United States. This right, the state court held, he had waived by his action, and this court said whether the state court was right or not was not a Federal question."

(Syl. 4.)

"Whether or not a person has lost a right under the Federal Constitution by his action or failure to act is not a Federal question which will sustain a writ of error to a state court."

See, also, Atlantic Coast Line Ry. Co. v. Mims, 61 L. Ed. 476, 478 (last para.).

The question whether Petitioner had the *right* to have this action tried in a particular venue was a Federal question. That right was sustained by the Supreme Court of Nebraska.

The decision of the Supreme Court of Nebraska that Petitioner had *waived* that right was based upon its established practice (which accords with the practice of all other jurisdictions)—was not rendered in the spirit of evasion—and was *not* a Federal question.

Therefore, under authority of Pierce v. Somerset Ry. Co. and Atlantic Coast Line Ry. Co. v. Mims, supra, this Court was without jurisdiction to review the holding of the Supreme Court of Nebraska in this respect.

Respectfully submitted,

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Attorneys for Respondent.

The attorneys named, for John O'Hara, Respondent herein, do hereby certify that the foregoing petition subscribed by them, for and on behalf of John O'Hara, Respondent, is well grounded in law and is not filed for purposes of delay.

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Attorneys for Respondent.